

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PUREWICK CORPORATION,) (Sealed)
Plaintiff,) CONFIDENTIAL
v.)
SAGE PRODUCTS, LLC,) C.A. No. 19-1508 (MN)
Defendant.)

Wednesday, February 23, 2022
2:00 p.m.
Oral Argument

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

SHAW KELLER LLP
BY: JOHN SHAW, ESQ.

-and-

QUINN EMANUEL URQUHART & SULLIVAN, LLP
BY: STEVEN CHERNY, ESQ.
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14:01:28 12

14:01:28 13 THE COURT: Good afternoon, everyone. Please be
14:01:30 14 seated.

14:01:33 15 Mr. Shaw.

14:01:34 16 MR. SHAW: Yes, Your Honor. John Shaw for
14:01:37 17 plaintiff, PureWick Corporation. Joining me from Quinn
14:01:40 18 Emanuel, Steven Cherny, Brian Biddinger, and Nicola Felice,
14:01:44 19 and from Becton Dickinson, Deanna Savage.

14:01:48 20 MR. CHERNY: Good afternoon, Your Honor.

14:01:49 21 THE COURT: Good afternoon.

14:01:52 22 MS. GAZA: Good afternoon, Your Honor. Anne
14:01:54 23 Gaza from Young, Conaway. I am joined today by my
14:01:57 24 colleagues from the McAndrews, Held & Malloy, Sandra
14:02:01 25 Frantzen, Bob Surrette, Christopher Scharff and Ryan

14:02:07 1 Pianetto, as well as my colleague from Young, Conaway,
14:02:10 2 Samantha Wilson.

14:02:11 3 THE COURT: Good afternoon to all of you as
14:02:13 4 well.

14:02:13 5 So we have reviewed all of the materials on
14:02:17 6 these motions. There are seven motions, but many, many
14:02:22 7 subparts. Before we start, let's deal with the '508 patent.
14:02:29 8 And that one seems like we should stay the case. It seems
14:02:32 9 like the case is different than TRUSTID. In TRUSTID not all
14:02:37 10 of the amended claims were invalidated and contested. They
14:02:39 11 didn't have a second trial where I was going to be forced to
14:02:43 12 hear the case again regardless. I didn't think that
14:02:46 13 PureWick cared that much, it was more of a deferral to me,
14:02:50 14 but maybe I misread that.

14:02:52 15 MR. CHERNY: Your Honor, Steve Cherny. You read
14:02:54 16 it correctly, we are entirely deferring to your views as to
14:02:58 17 what is best for the Court.

14:03:02 18 THE COURT: Okay. So with that I think I am
14:03:02 19 going to stay the case. I think the stay will simplify the
14:03:02 20 issues. We're late in the litigation, but all of the
14:03:08 21 asserted claims in that patent have been invalidated. I
14:03:12 22 don't think it's terribly prejudicial to PureWick to say
14:03:12 23 that the claim to the PTAB has been found to be unpatentable
14:03:12 24 particularly given that PureWick has already brought a
14:03:12 25 second lawsuit and we're going to have a second trial if we

14:03:21 1 need to deal with the '508 Patent claims. So Sage, don't
14:03:26 2 file a motion. I granted you the relief. And I am done
14:03:30 3 with that issue.

14:03:31 4 Okay. So any parts of the summary judgment
14:03:34 5 motions that deal with the five -- or the motions to exclude
14:03:37 6 that deal with the '508 are going to be denied as moot
14:03:40 7 subject to being brought again if that patent comes back.

14:03:44 8 All right. Now, I have allotted thirty minutes
14:03:49 9 for each side for this hearing. So Sage, either you're
14:03:56 10 going to be talking fast or you're going to have to
14:04:00 11 prioritize. But there were a couple of things that I
14:04:04 12 thought I would say at the beginning to try to shorten
14:04:07 13 things. Starting with plaintiff's position on summary
14:04:11 14 judgment and to exclude opinions inconsistent with my claim
14:04:17 15 construction, DI 190. I am going to deny that motion as to
14:04:21 16 summary judgment.

14:04:21 17 As to the exclusion of opinions inconsistent
14:04:25 18 with my claim construction, I will grant it. No one should
14:04:29 19 be offering arguments or opinions inconsistent with any of
14:04:32 20 my claim constructions from either side. More specifically,
14:04:36 21 I construed a casing, meaning an outer cover having or
14:04:42 22 defining a fluid reservoir at the first end and a fluid
14:04:46 23 outlet at the second end. I rejected the defendant's
14:04:48 24 proposal that the construction included a negative
14:04:52 25 limitation that a backing/impermeable layer in combination

14:04:55 1 with securing portion for other components is not a casing.

14:04:58 2 So defendants cannot argue that the patent excludes such

14:05:01 3 things as casings by definition citing to the patent.

14:05:06 4 Similarly I construed a wicking material to mean

14:05:09 5 an article that moves moisture by capillary action from one

14:05:13 6 surface of the article to the other. That is the

14:05:18 7 construction. To the extent that defendant argues that

14:05:23 8 comments I made about absorption need to be read into the

14:05:27 9 construction, I disagree. I did not construe the wicking

14:05:30 10 term to mean that a moisture absorbant material could not

14:05:34 11 also be moisture wicking, so you cannot base your augment on

14:05:39 12 that. If you have an argument that the moisture is not

14:05:42 13 moved by capillary action, that's fine, you can make that as

14:05:45 14 a factual matter, but you cannot argue that simply because

14:05:49 15 it absorbs it is not wicking.

14:05:52 16 I think those were the only two terms that were

14:05:54 17 at issue in the contrary to claim construction. Correct,

14:05:56 18 Mr. Cherny?

14:05:57 19 MR. CHERNY: Correct.

14:05:58 20 THE COURT: All right. So now, let me see if

14:06:00 21 there were any other easy ones to deal with. No, I think

14:06:04 22 they were all on the '508. We're going to go one, one, and

14:06:12 23 you can prioritize with what you want to raise.

14:06:12 24 MS. GAZA: Your Honor, if I may, as an

14:06:12 25 administrative matter, we have marked our slides

14:06:23 1 confidential. And we do anticipate that there may be some
14:06:26 2 confidential material addressed during this proceeding. We
14:06:30 3 believe that there may be some confidential information also
14:06:33 4 in PureWick's slides. We would ask if we could seal the
14:06:37 5 transcript subject to redactions pursuant to the local
14:06:41 6 rules.

14:06:41 7 THE COURT: We can do that, but I want ultra
14:06:44 8 minimum redactions. If you start over-redacting, it's all
14:06:48 9 going to come in. Court proceedings are public proceedings.

14:06:51 0 MS. GAZA: Thank you, Your Honor.

14:06:52 1 THE COURT: All right. Mr. Cherny, are you
14:06:55 2 going first?

14:06:56 3 MR. CHERNY: If plaintiff goes first, then I'm
14:06:58 4 going first.

14:06:59 5 THE COURT: Okay.

14:06:59 6 MR. CHERNY: Make sure we have the right one.

14:07:04 7 We do.

14:07:05 8 Good afternoon, Your Honor. May it please the
14:07:08 9 Court.

14:07:08 0 THE COURT: And by the way, you can leave your
14:07:10 1 mask on or take it off, you can speak from the table,
14:07:12 2 whatever you want, whatever is your preference.

14:07:12 3 MR. CHERNY: I will stand at the lectern and
14:07:15 4 remove my mask, Your Honor.

14:07:20 5 THE COURT: Sorry about that. I usually tell

14:07:22 1 people that.

14:07:22 2 MR. CHERNY: That's okay. So I'm going to start
14:07:24 3 with our motion relating to what I call the bundling of
14:07:29 4 PureWick prior art devices, Your Honor.

14:07:32 5 THE COURT: Here is my question for this one
14:07:34 6 just to shorten this one, because I did look at your slides
14:07:37 7 and I get it, this is what you have been worried about the
14:07:40 8 whole time.

14:07:40 9 MR. CHERNY: Yes.

14:07:41 0 THE COURT: But in the final contentions,
14:07:46 1 defendant says look, these all have similar salient features
14:07:50 2 and it did mention the brown tape products. So it could
14:07:54 3 have been clearer, but isn't there enough in there to put
14:07:58 4 you on notice?

14:07:59 5 MR. CHERNY: Two things, Your Honor. No, there
14:08:00 6 is not because there were a number of products that had
14:08:03 7 brown tape. But also, perhaps more importantly, by doing
14:08:07 8 that, they avoided the limiting of the order down to 35 and
14:08:11 9 then later by essentially including approximately 100
14:08:15 0 devices, and what's even more problematic is --

14:08:19 1 THE COURT: Are there currently 100 devices that
14:08:22 2 they're asserting of these PureWick prior art things?

14:08:23 3 MR. CHERNY: I apologize, Your Honor, there were
14:08:27 4 up and through until expert discovery.

14:08:32 5 THE COURT: Okay.

14:08:33 1 MR. CHERNY: Every time -- but obviously I'm
14:08:35 2 happy to continue answering questions, but Your Honor, I can
14:08:38 3 go through and point out one other issue that I think is not
14:08:41 4 coming to the forefront now.

14:08:43 5 So obviously you have seen -- this is your
14:08:46 6 order, and early on they came to you and said look, compel
14:08:51 7 these guys to differentiate between this grouping of like a
14:08:55 8 hundred prior devices that span three years, different
14:08:58 9 times, different dates, many of which had similar -- many
14:09:01 10 very different. And that's what they look like. They're
14:09:05 11 literally tens of these things from different years. You
14:09:09 12 said wait a second, I'm not going to make you tell you
14:09:13 13 what's different about them or why they're not prior art
14:09:15 14 until you actually give them specific contentions. I know
14:09:19 15 you have read the slide, but it helps me pace myself to be
14:09:23 16 repetitive.

14:09:23 17 So anyway, we get to December 18, 2020, this is
14:09:28 18 when they're supposed to limit, there is a title, PureWick
14:09:31 19 prior art devices. That's PureWick prior art devices. That
14:09:35 20 doesn't really seem like that's complying with your limiting
14:09:37 21 and it actually put us in a tough position wherein terms of
14:09:41 22 claim construction we had to go in thinking about all these
14:09:43 23 indifferent things without them identifying the specific art
14:09:47 24 they were relying on, and you have this broad array of
14:09:51 25 years.

14:09:51 1 Here is what they claim was their
14:09:54 2 element-by-element analysis of versions of the PureWick
14:09:56 3 prior art devices and then they would go element by element
14:10:00 4 saying PureWick prior art devices. Now, we tried hard
14:10:05 5 throughout discovery to get them to get off of this
14:10:07 6 position. They then raised this in -- we have back and
14:10:11 7 forth motions in front of Magistrate Judge Fallon and they
14:10:15 8 say that the only reason they won't tell us what's different
14:10:19 9 is because we won't identify the prior art devices. And
14:10:24 10 they say they should be counted as one reference. They all
14:10:27 11 have the same salient features. I keep saying throughout
14:10:30 12 this case, I don't know what it means to have the same
14:10:32 13 salient feature. When you look at these different products,
14:10:35 14 they're entirely different. I want you to keep in mind
14:10:38 15 because this is something that's not entirely clear from
14:10:40 16 your slides as to why this becomes a problem. So we got the
14:10:44 17 April 5th, 2021 final contentions and as you can see, the
14:10:51 18 devices are referred to herein as the PureWick prior art
14:10:54 19 devices are the PureWick female external catheter products
14:10:58 20 tested, offered for sale, sold between 2013 and 2016, so
14:10:58 21 three years down there. Some of these can't be prior art
14:11:02 22 because priority date at latest is 2015. These public
14:11:02 23 disclosures of PureWick prior art devices include female
14:11:12 24 catheter products tested during 2013, '14 and '15, curved,
14:11:15 25 extruded, everything is still under PureWick prior art

14:11:18 1 devices. This is at the end of fact discovery.

14:11:21 2 What happens is what they said here is explain
14:11:24 3 these public disclosures, that's what just came from here,
14:11:28 4 include curved, extruded, tapered, they said PureWick
14:11:33 5 products are not one product because they have different
14:11:36 6 colored tape, et cetera, they should be counted as one
14:11:39 7 reference as they all have the same salient features. As of
14:11:42 8 the end of fact discovery their position is everything is
14:11:45 9 one. They're all the same. There is no difference between
14:11:47 10 any of them. That's the position that they took, again, in
14:11:49 11 front of Judge Fallon. And she says, look, you guys want to
14:11:51 12 bundle this, but the plaintiff doesn't agree they're all the
14:11:53 13 same, at some point there will be motion practice. And
14:11:56 14 guess what, there is motion practice.

14:12:01 15 And she then points out because they again try
14:12:04 16 to say well, you guys should tell us what's different about
14:12:07 17 all these things and Judge Fallon not surprisingly said I
14:12:12 18 looked at this, this is the same as the issue back in
14:12:15 19 December in front of Judge Noreika. You had all the stuff,
14:12:18 20 you had the samples, you had the pictures, you could
14:12:21 21 actually identify specifically amongst these hundred
14:12:22 22 different things over three years, but you keep trying to
14:12:25 23 shift it to PureWick. So this is the end of fact discovery
14:12:30 24 and this is where we're at, everything is the same.

14:12:32 25 And I then predicted, I said look, I'm willing

14:12:37 1 to live with that being their contention interrogatory, they
14:12:41 2 say everything is the same, it's all PureWick prior art
14:12:44 3 devices, but they can't come forward in expert discovery and
14:12:47 4 say this specific one is invalidated for this reason. Guess
14:12:51 5 what, here is one of the ones that was allegedly the same.
14:12:54 6 This is their expert report.

14:12:57 7 I will explain further, PureWick asserts the
14:13:00 8 extruded wick prototype is an embodiment of the inventions
14:13:02 9 in the claim. I disagree as a number of elements were
14:13:06 10 missing. This is one that was before one of PureWick prior
14:13:09 11 art devices, part of one that --

14:13:12 12 THE COURT: Now it's not covered?

14:13:13 13 MR. CHERNY: Now it's not covered. And now I'm
14:13:15 14 sure knowing the Court is inquisitive, why are they saying
14:13:19 15 this, because they had pointed to this as supporting our
14:13:21 16 earlier priority date, so all of a sudden it didn't have the
14:13:25 17 same salient features, whereas this version of the brown
14:13:28 18 paper, remember there was five or six different ones with
14:13:32 19 brown tape and there was testimony that didn't differentiate
14:13:34 20 in terms of saying which one was when, and whether one was
14:13:37 21 covered up, and this one now that you point to, that's the
14:13:41 22 only one out of a hundred, now two things that before were
14:13:44 23 the same don't have the same salient features anymore. And
14:13:47 24 of course, why couldn't we have known that during fact
14:13:50 25 discovery? It would have been better had they actually

14:13:53 1 followed the court order and said here is the ones we're
14:13:55 2 picking, but they chose not to, and so not surprisingly this
14:13:59 3 is where we are.

14:14:00 4 Here is their interrogatory. As explained,
14:14:03 5 these public disclosures of PureWick prior art devices
14:14:07 6 including female, and in that three-year span, extruded --

14:14:11 7 THE COURT: Is the one that's now being
14:14:14 8 excluded.

14:14:14 9 MR. CHERNY: Extruded.

14:14:16 10 THE COURT: No, I'm sorry, is the one that's
14:14:18 11 being excluded, that's the extruded one in those time
14:14:21 12 periods?

14:14:21 13 MR. CHERNY: Right. That's what this is
14:14:23 14 pointing out here. It says 2013-2014, that's the entire
14:14:28 15 period of all of those devices, that hundred devices. And
14:14:32 16 in each of these instances the PureWick prior art device
14:14:35 17 included every element of the asserted claim. So those
14:14:38 18 things are unclear, literally this is from their final
14:14:41 19 contentions was extruded plus everything which includes
14:14:42 20 every element of asserted claims, this is the end of fact
14:14:42 21 discovery. And, in fact -- but then you get to the expert
14:14:52 22 report, all of a sudden it's different. I mean, look, there
14:14:52 23 is always some amount of sloppiness, but we brought this
14:14:52 24 issue up over and over and over again, said look, it's not
14:15:02 25 fair that they are not limiting it out --

14:15:04 1 THE COURT: Let me hear from the defendant.

14:15:05 2 MR. CHERNY: Okay.

14:15:07 3 THE COURT: And I don't want you to just he said

14:15:10 4 she said, I can see where it says prior art products and I

14:15:16 5 want to see where did you ever get more specific during

14:15:21 6 discovery that it's not something new in the expert report,

14:15:25 7 that's what I want, one. And two, it does seem like there

14:15:29 8 was a change in position from the expert -- from the

14:15:32 9 interrogatory where it said everything is included, and now

14:15:36 10 the expert is saying oh, no, that one is not included

14:15:40 11 because that one might be helpful to them. So I want to see

14:15:43 12 where that is consistent with what you disclosed in

14:15:47 13 discovery as well.

14:15:48 14 MS. FRANTZEN: Okay. So let me start on slide

14:15:53 15 72 and hopefully we can find that slide for you.

14:15:56 16 The one kind of overarching point that I

14:16:00 17 actually want to make is that during fact discovery we had

14:16:04 18 been attempting to ascertain information about these various

14:16:07 19 products, but one thing that was kind of very clear as

14:16:11 20 Mr. Cherny put up those hundred devices, 75 percent of those

14:16:15 21 devices are not PureWick prior art devices. I have no idea

14:16:20 22 what that image is. That includes stuff from the '508

14:16:23 23 patent on it, that includes our current product --

14:16:25 24 THE COURT: Stop.

14:16:25 25 Mr. Cherny, is that true?

14:16:27 1 MR. CHERNY: No, that was all claimed PureWick
14:16:31 2 prior art devices that they never identified what was in.
14:16:35 3 THE COURT: So his point is, that's everything
14:16:38 4 that PureWick made before. You just said PureWick prior art
14:16:43 5 as if you were somehow including well, of course only those
14:16:48 6 things that are covered by the patent and he's saying, well,
14:16:51 7 I don't know what those are, so here is everything.
14:16:54 8 MS. FRANTZEN: Your Honor, some of those
14:16:55 9 products are their current product that were not
14:16:59 10 manufactured in 2016 and some of those are the '508 patent.
14:17:02 11 With due respect, Mr. Cherny is not accurate in saying those
14:17:06 12 are PureWick prior art devices, that is just not true. And
14:17:09 13 with respect --
14:17:10 14 THE COURT: When did he get more specific during
14:17:15 15 discovery?
14:17:16 16 MS. FRANTZEN: Two points. Let me go to this
14:17:18 17 slide where we were specifically -- this is in our
14:17:23 18 invalidity contentions where we were focusing on the brown
14:17:28 19 taped version and the fact that we did not learn until the
14:17:30 20 last week of discovery that they had sold this brown tape
14:17:35 21 product in July 2015 and we specifically identified it in
14:17:39 22 our contentions, the female external catheter product
14:17:43 23 disclosed and demonstrated brown tape in association with
14:17:46 24 the CONNECT Foundation's most innovative new product award.
14:17:50 25 We had subpoenaed CONNECT to get the information that said

14:17:53 1 that they had sold the product in July 2015. During
14:17:57 2 discovery, Your Honor ordered them to identify when the
14:17:59 3 products were sold. This is an order by Your Honor to say
14:18:04 4 identify the patent products when they were sold. Their
14:18:07 5 first response told us right immediately after that there
14:18:10 6 wasn't a disclosure until September 2015. In February,
14:18:16 7 months later into fact discovery, they finally revealed that
14:18:20 8 there was a sale in July 26, 2015, but they would not tell
14:18:24 9 us what product it was. It was not until we subpoenaed
14:18:27 10 CONNECT Foundation, this is a video from CONNECT Foundation
14:18:30 11 where they disclosed the product and showed the brown tape
14:18:33 12 version, and that was -- this is their application to
14:18:36 13 CONNECT -- sorry, let me find it here. I'm skipping
14:18:40 14 through. This is their application to CONNECT that says the
14:18:43 15 product was sold July 26th, 2015, which was clearly prior to
14:18:48 16 the September 8, 2016, priority date.

14:18:51 7 THE COURT: When did you get this?

14:18:57 8 MS. FRANTZEN: This was produced to CONNECT I
14:19:01 9 would say maybe thirty days before the close of fact
14:19:03 10 discovery. This is a CONNECT fact document. And the
14:19:06 11 witnesses that were their witnesses and inventors that
14:19:09 12 testified about these documents were not deposed and not
14:19:12 13 made available until the last week of fact discovery, which
14:19:15 14 was after our invalidity contentions were due.

14:19:20 15 THE COURT: When did you disclose this? Did you

14:19:22 1 then supplement your invalidity contentions or did you wait
14:19:25 2 for an expert report?

14:19:27 3 MS. FRANTZEN: Our invalidity contentions
14:19:30 4 mention the CONNECT Foundation because we were aware of the
14:19:33 5 award and the fact that it was pictured in the award and
14:19:38 6 that there was a sale in July 2015, but they never told us
14:19:42 7 as I showed in this interrogatory where it says they said a
14:19:45 8 single sale was made on July 26, 2015. This was in February
14:19:51 9 2021, during fact discovery, they say they were unable to
14:19:54 10 determine which product was sold as of that date. I mean,
14:19:57 11 this is a case where we have a clear on sale bar. If the
14:20:02 12 priority date issue is accepted and it is one of our key
14:20:05 13 defenses, and we did everything we could during fact
14:20:09 14 discovery, we supplemented every time we could to identify
14:20:12 15 the brown tape product and --

14:20:14 16 THE COURT: Tell me, though, about how this --
14:20:18 17 where in fact discovery you disclosed that there is one that
14:20:23 18 they're relying on for priority that doesn't have all of the
14:20:28 19 elements?

14:20:30 20 MS. FRANTZEN: Well, we always said that --

14:20:33 21 THE COURT: Show me, don't tell me we always
14:20:35 22 said, show me where it was disclosed.

14:20:38 23 MS. FRANTZEN: Well, in our summary judgment
14:20:41 24 motion, and I'm sorry I don't have a slide on this, in our
14:20:45 25 summary judgment motion, they alleged priority based on the

14:20:48 1 March 2014 application. The March 2014 application
14:20:51 2 discloses that extruded wick embodiment, and so we have
14:20:57 3 always alleged that they were not entitled to priority based
14:20:59 4 on the March 2014 --

14:21:01 5 THE COURT: But I'm not talking about the
14:21:03 6 application, I'm asking your expert said a particular
14:21:06 7 product, at least as I read the slide that was up there, I
14:21:10 8 had said a particular product, the extruded product was
14:21:18 9 missing elements. Where was that disclosed?

14:21:21 0 MS. FRANTZEN: They brought up the extruded
14:21:26 1 product as missing elements in their expert reports to
14:21:29 2 support their priority argument.

14:21:32 3 THE COURT: Can someone tell me what page this
14:21:34 4 is? Because as I remember it, it said something like I
14:21:38 5 disagree with PureWick that this contains all of the
14:21:41 6 elements. And you're saying PureWick is saying it had
14:21:45 7 missing elements.

14:21:47 8 MS. FRANTZEN: No, no, I'm sorry, PureWick was
14:21:50 9 saying it had all the elements because they were arguing --

14:21:52 0 THE COURT: Where in discovery, not in your
14:21:56 1 expert report, did you say that?

14:21:58 2 MS. FRANTZEN: We didn't have to say it because
14:21:59 3 it didn't have to do with our invalidity position, it had to
14:22:02 4 do with them establishing priority, so it was not our --

14:22:05 5 THE COURT: You were never asked about what was

14:22:09 1 missing or why they weren't entitled to priority, there was
14:22:13 2 no --

14:22:15 3 MS. FRANTZEN: We served an interrogatory on
14:22:17 4 them that said tell us why you believe you're entitled to
14:22:20 5 priority which is not at issue here, and they relied on that
14:22:24 6 device.

14:22:26 7 THE COURT: So I think the problem here is you
14:22:31 8 had -- and I get what you're saying about CONNECT, but you
14:22:36 9 had an interrogatory response that said all these products,
14:22:40 10 extruded, elongated, whatever they are from 2013, '14 and
14:22:45 11 '15, are prior art and invalidate these claims. And now
14:22:51 12 there is one of those that you are saying is missing
14:22:56 13 elements. Why aren't they entitled to rely on your
14:23:03 14 assertions during fact discovery that you are saying all the
14:23:08 15 products had them?

14:23:12 16 MS. FRANTZEN: Your Honor, we never asserted
14:23:13 17 that, the thing that he was pointing to was part of this.
14:23:16 18 We always relied on the devices that had --

14:23:19 19 THE COURT: So hold on, stop talking when I'm
14:23:22 20 talking.

14:23:22 21 MS. FRANTZEN: Pardon me.

14:23:22 22 THE COURT: It's only important that I
14:23:25 23 understand, not that you get to talk.

14:23:22 24 MS. FRANTZEN: Sure.

14:23:22 25 THE COURT: Okay. So when I have this

14:23:32 1 interrogatory and response that says PureWick's prior art
14:23:55 2 devices including female external catheter products tested
14:23:59 3 during 2013, '14 and '15, e.g., curved, extruded, tapered,
14:24:05 4 spun fiber backing, and you are saying that those products
14:24:09 5 were what were invalidating the claims?

14:24:13 6 MS. FRANTZEN: The products that -- from 2013,
14:24:17 7 '14 and '15.

14:24:18 8 THE COURT: And is the product that is now being
14:24:21 9 said is missing elements from that time period?

14:24:21 10 MS. FRANTZEN: I -- they say it's before that
14:24:30 11 time period and that they filed a patent on it in
14:24:33 12 March 2014, so they are alleging --

14:24:36 13 THE COURT: So I'm trying to understand, you
14:24:39 14 know, again, fair disclosure, and I take your point on
14:24:42 15 CONNECT, whatever. This one is a different issue because
14:24:45 16 this one is saying now they have to deal with an issue where
14:24:49 17 you're saying before all these products, all the same, same
14:24:51 18 salient features, and now you're saying oh, this guy, he
14:24:59 19 doesn't have the same salient features. And that I don't
14:25:02 20 see where there was a fair disclosure of that given that you
14:25:08 21 said generally extruded products in 2013, '14 and '15 fell
14:25:12 22 into that category.

14:25:12 23 MS. FRANTZEN: Your Honor, I guess the
14:25:12 24 disconnect is that we were not relying on that so we had no
14:25:23 25 reason to disclose that it was missing a feature. I mean,

14:25:26 1 why would we -- they actually served an interrogatory on
14:25:29 2 them asking them to identify any that were missing a feature
14:25:32 3 and they didn't identify any. But we had no reason to say
14:25:37 4 oh, by the way, there is one that's missing a feature. We
14:25:40 5 were trying to say the ones that had all the features.

14:25:43 6 THE COURT: When did you understand that they
14:25:44 7 were asserting priority and that that was covered?

14:25:49 8 MS. FRANTZEN: We served an interrogatory on
14:25:51 9 them asking for their priority arguments and they provided
14:25:55 10 that early in the case.

14:25:56 11 THE COURT: So you knew from early in the case
14:25:58 12 that this particular product was being asserted to have all
14:26:04 13 of the elements?

14:26:06 14 MS. FRANTZEN: They didn't rely on the product,
14:26:08 15 they only relied on what was in the application. Later in
14:26:11 16 expert discovery they were the ones during their own expert
14:26:15 17 reports that said this product embodies the priority
14:26:20 18 application. They did that, not us. So just to kind of set
14:26:24 19 the stage, in their expert report, we asked for priority,
14:26:26 20 they relied on their patent applications, not products, they
14:26:31 21 said this patent application discloses X, Y, Z. Then when
14:26:35 22 we came to their expert reports, they said in their expert
14:26:38 23 reports that this product that Mr. Cherny is showing you has
14:26:42 24 all the elements, and we said we don't agree that -- we said
14:26:48 25 it's missing this element. And that was consistent with

14:26:51 1 what we have been arguing all along.

14:26:53 2 THE COURT: All right. All right. I don't need
14:26:55 3 you to tell me you were consistent.

14:26:57 4 Mr. Cherny, when was the first time that you
14:27:00 5 disclosed that a particular product rather than an
14:27:02 6 application had all the elements?

14:27:03 7 MR. CHERNY: From our perspective, Your Honor,
14:27:05 8 in order to prove priority for the provisional, we have to
14:27:09 9 show that it was in the application, then after they lump
14:27:12 10 everything together and said they all had the same salient
14:27:16 11 features we used that and pointed to it and said well, given
14:27:18 12 that this is from our perspective the same thing, but we
14:27:21 13 won't point to a product to prove priority, we would prove
14:27:24 14 physical application, that's where it's got to be disclosed,
14:27:29 15 I think they were relying on the fact that that plus
14:27:32 16 everything else met all the elements, so I don't see where
14:27:34 17 the argument here is from their perspective.

14:27:38 18 THE COURT: All right. I am going to deny the
14:27:39 19 motion. And if you want to cross-examine their expert with
14:27:42 20 what they said before was included and that he's being
14:27:45 21 inconsistent, I guess you can do that.

14:27:50 22 All right. What's next? Defendant, what's your
14:27:52 23 first motion?

14:27:54 24 MS. FRANTZEN: Okay. I'm happy to turn to our
14:27:57 25 Daubert motion.

14:27:58 1 THE COURT: Well, your Daubert motion has
14:28:00 2 seventeen different things you asked me to exclude in
14:28:04 3 nineteen pages.

14:28:04 4 MS. FRANTZEN: I promise we'll be more focused.

14:28:07 5 THE COURT: You better be.

14:28:09 6 MS. FRANTZEN: Let me turn to slide 5. And the

14:28:13 7 one issue we wanted to talk about was our motion on

14:28:18 8 Mr. Jezzi and his new testing. So with regard to the '508

14:28:25 9 patent -- I'm sorry, the '407 patent which is the male

14:28:29 10 product, the '407 patent requires this wicking material to

14:28:32 11 be the top layer where the genitals lay on the materials.

14:28:39 12 And what happened is because this is a patent case, PureWick

14:28:43 13 alleged that this material which is a microclimate layer was

14:28:48 14 the alleged wicking material. During expert reports, their

14:28:51 15 opening expert report and their expert did not provide any

14:28:54 16 testing evidence. And here is a quote on slide 7 that

14:28:58 17 addresses that. And so then our expert responded and said

14:29:03 18 yeah, it's not wicking. It actually repels water, it's not

14:29:07 19 a wicking material at all.

14:29:02 20 And then what happened is on reply they got a

14:29:12 21 new expert, Dr. Jezzi, and Mr. Jezzi was their invalidity

14:29:12 22 expert. And Mr. Jezzi provided these splat tests that

14:29:22 23 purported to say that for the first time these tests prove

14:29:24 24 that this material is wicking.

14:29:25 And as we explained in our briefing, the tests

14:29:30 1 didn't follow any known procedures and they gave false
14:29:33 2 results. I'm happy to talk about why that's true, but the
14:29:37 3 main reason was he was going to apply a horizontal test, you
14:29:42 4 have to suspend it and he basically splatted it, splatted
14:29:47 5 globules and said look, the fluid spread. And then he also
14:29:52 6 separately did a test that used the wrong material.

14:29:54 7 So if we can go to slide 17, we believe that
14:30:01 8 that testing was unreliable. It didn't use known
14:30:07 9 methodology and it's the type of information that should be
14:30:10 10 stricken. And at a minimum, as we noted here, we put in a
14:30:15 11 footnote, we should at least -- they should not be bringing
14:30:18 12 new infringement theories on the fly and we should at least
14:30:21 13 have a chance for our expert to respond, but we believe it
14:30:24 14 should have been stricken in the first instance.

14:30:26 15 THE COURT: All right. Who has got this one?

14:30:32 16 So here is my question. How is this going to be
14:30:34 17 used at trial? So you didn't put it in in your opening
14:30:38 18 reports, so it's not coming in in your case in chief, right?

14:30:41 19 MR. BIDDINGER: That's correct, Your Honor.

14:30:43 20 THE COURT: So you use it in rebuttal if they
14:30:45 21 get up and put in test results; right?

14:30:48 22 MR. BIDDINGER: Correct, Your Honor.

14:30:49 23 THE COURT: How is their expert supposed to
14:30:52 24 respond, like let's say he thinks that your expert's test
14:30:55 25 results are garbage, how does he respond?

14:31:00 1 MR. BIDDINGER: Well, Your Honor, I guess on
14:31:02 2 that specific question, they never asked to do any kind of
14:31:07 3 reply to our testing report. They did bring it up in their
14:31:10 4 opposition -- or in their motion and we didn't oppose it,
14:31:14 5 but we haven't heard anything about it since that point in
14:31:17 6 time. So if they need to put in some kind of supplement to
14:31:21 7 address that, we won't oppose that. But the reason that we
14:31:24 8 got to this point that we're at is because during fact
14:31:28 9 discovery, we provided our contentions, they are exactly
14:31:31 10 what we relied on --

14:31:35 11 THE COURT: Yeah, you don't have to tell me
14:31:37 12 because I'm not going to exclude it and I don't want to hear
14:31:41 13 how nobody understood what anybody else was doing in fact
14:31:44 14 discovery. So I am going to deny the motion both with
14:31:47 15 respect to the new result and saying that they are
14:31:51 16 unreliable. I think that the reliability issue is a
14:31:55 17 question of weight and can be addressed during
14:31:58 18 cross-examination.

14:31:59 19 And defendant, if you want to take -- if you
14:32:01 20 want to put in a short expert report to address the results
14:32:05 21 and then give your expert up for a deposition limited to
14:32:09 22 that, you can do so.

14:32:12 23 Okay. Plaintiff.

14:32:22 24 MR. BIDDINGER: Your Honor, the next motion we
14:32:35 25 would like to talk about is DI 199, the motion to exclude

14:32:38 1 the expert report, reply expert report of Erika Lietzan.

14:32:46 2 And --

14:32:48 3 THE COURT: I'm sorry, what number?

14:32:50 4 MR. BIDDINGER: I believe it's DI 199. 201.

14:32:54 5 Sorry.

14:33:00 6 So the issue here, Your Honor, is actual this

14:33:03 7 actually relates --

14:33:04 8 THE COURT: Before -- I don't want to cut you
14:33:06 9 off from arguing, but what is the point of this, other than
14:33:09 10 to say he's lying? I don't know, whoever is opposing this,
14:33:15 11 I didn't understand this report other than to have an expert
14:33:20 12 testify about this guy's credibility which seemed like maybe
14:33:24 13 there is some good points in there you can do on cross, but
14:33:27 14 basically she's just saying I don't believe what he said.

14:33:33 15 MS. FRANTZEN: No, Your Honor, I think it's
14:33:36 16 just, he's not discussing the credibility at all, rather
14:33:40 17 they are arguing there has been experimental use, again,
14:33:43 18 with the prior devices, and that the uses were experimental
14:33:48 19 and not public disclosures. And what Dr. Lietzan testifies
14:33:52 20 is that if they were, in fact, experimental, these are
14:33:57 21 medical devices that require FDA documentation and she
14:34:01 22 discusses the FDA aspects of it and says there is no
14:34:05 23 evidence that it's experimental use because there is no
14:34:09 24 requisite FDA document. That's it. It's specifically in
14:34:12 25 response to their argument, Mr. Jezzi's argument that it was

14:34:16 1 experimental and that the products did not work for their
14:34:19 2 intended purpose as their kind of defense to the public use
14:34:23 3 issue.

14:34:23 4 THE COURT: So what is she going to say?
14:34:25 5 Because when I read the excerpts it was like well, what he
14:34:29 6 said is not right, and that -- for him to imply this is
14:34:33 7 wrong, it seems like there was a lot of credibility in there
14:34:38 8 rather than her just saying look, if you did experimental
14:34:44 9 testing, you would need documents. Have you seen any
14:34:48 10 documents? And that's it. But she seems like she had a
14:34:51 11 heck of a lot of stuff in her report other than that.

14:34:54 12 MS. FRANTZEN: Your Honor, the intent is only to
14:34:57 13 have what documents would be required to show that there is
14:35:00 14 experimental testing, like what you would need to have and
14:35:03 15 that they don't have those documents. And she just walks
14:35:07 16 through the FDA regs for that.

14:35:09 17 THE COURT: And not talking about what Dr. Jezzi
14:35:12 18 said.

14:35:12 19 MS. FRANTZEN: She does say he said this, but I
14:35:15 20 don't agree that it was experimental because you would have
14:35:17 21 to have these documents documenting it. So she disagrees
14:35:22 22 with him, I guess, but her main point is that the
14:35:23 23 documentation is not there to support the claim that this
14:35:24 24 medical device was an experiment.

14:35:25 25 THE COURT: All right. Now I'll let you talk.

14:35:33 1 MR. BIDDINGER: Thank you, Your Honor. So this
14:35:38 2 is not -- first of all, I would say Professor Lietzan said
14:35:43 3 that there should be documents no matter what, whether it's
14:35:46 4 experimental or not, you know, developing a medical device
14:35:50 5 if you're using it, if you're testing it, if you're selling
14:35:55 6 it, she said there should be documents, but I don't have the
14:35:58 7 documents. It's not directed to this experimental use
14:36:00 8 issue. If you look at what she says, she's saying she's
14:36:04 9 taking his response to them when he says look, you haven't
14:36:07 10 proven this prior use or sale, right, you haven't shown
14:36:10 11 which device was actually tested when, you know, who it was
14:36:14 12 tested with, whatever, on the right is what she's saying.
14:36:17 13 Jezzi, she's saying implies there is no records, reference,
14:36:21 14 and then she goes on and says this documentation could have
14:36:24 15 been on the server that I understand is missing, PureWick
14:36:27 16 should have documented and recorded these things. Right?
14:36:30 17 THE COURT: Okay. Let's say I say all of that
14:36:33 18 goes, okay, she can't speculate about what would have been
14:36:37 19 on a server, whatever. What about her just getting up and
14:36:42 20 saying look, in order to do testing on a medical device for
14:36:48 21 the FDA, you need documentation, I haven't seen it.
14:36:52 22 MR. BIDDINGER: So I guess I would say that's
14:36:56 23 still speculation from the standpoint she has no -- we don't
14:37:00 24 know if those documents existed or not. Nobody has proven
14:37:03 25 that. If they thought during discovery that those documents

14:37:06 1 should have existed, they could have moved to compel on
14:37:09 2 that. They didn't do that. It's a discovery dispute that's
14:37:13 3 being aired in front of the jury. We don't believe the
14:37:16 4 documentation did exist. This is a husband and wife who
14:37:19 5 developed this product in their kitchen.

14:37:22 6 THE COURT: Let's say that it never existed, not
14:37:24 7 that it's been lost, but it never existed, is that relevant
14:37:27 8 to whether or not it was an experimental use?

14:37:31 9 MR. BIDDINGER: If there is no documents that
14:37:32 10 prove an experimental use, then that's the answer, right,
14:37:35 11 then there is no proof that there was an experimental use,
14:37:38 12 it's a failure of proof issue.

14:37:40 13 THE COURT: On whose part?

14:37:42 14 MR. BIDDINGER: On our part in terms of proving
14:37:44 15 that there was an experimental use. We don't need an expert
14:37:47 16 to get up there and say oh, there might be documents out
14:37:50 17 there and I would expect to see them and they should be
14:37:53 18 coming forward with those documents, that's completely
14:37:57 19 irrelevant for the jury to decide that. The jury looks at
14:38:00 20 the facts and decides was it experimental or not.

14:38:02 21 One last point, there are documents, there are
14:38:05 22 logs relating to the testing that are on the exhibit list.
14:38:08 23 There is not like a complete absence of documents relating
14:38:11 24 to the testing. It happened, it's just that she doesn't
14:38:15 25 think that they're the right kind of documents that the FDA

14:38:20 1 required.

14:38:20 2 THE COURT: Let's say that's an argument, you
14:38:22 3 say here is our testing documents, and they want to say
14:38:25 4 well, that's nice, but these aren't the type of testing
14:38:29 5 documents that show an experimental use. How are they
14:38:32 6 supposed to do that, to say that your guy, they're not, and
14:38:36 7 he says they are, why can't they have someone come in and
14:38:40 8 say yeah, typically what the FDA sees is this.

14:38:44 9 MR. BIDDINGER: I don't -- I guess to me, Your
14:38:47 10 Honor, that's just completely abstract because we have no
14:38:50 11 idea if those documents existed or not, so you're suggesting
14:38:53 12 to the jury --

14:38:55 13 THE COURT: You just said, you just said we have
14:38:58 14 documents.

14:38:59 15 MR. BIDDINGER: Yes.

14:38:59 16 THE COURT: Okay. We have documents that we are
14:39:02 17 going to use to show experimental use. It's your burden.
14:39:07 18 And they want to say those documents aren't enough and how
14:39:12 19 are they supposed to say that? How do they get that in?

14:39:12 20 MR. BIDDINGER: That's not what she says, Your
14:39:20 21 Honor. She doesn't look -- to answer your question, I don't
14:39:22 22 know how they get that in because they haven't come forward
14:39:26 23 with somebody who says that. She doesn't look at the
14:39:28 24 documents that exist and say those aren't sufficient to
14:39:31 25 prove experimental use and those aren't the type of

14:39:34 1 documents the FDA requires. She simply says here is what
14:39:37 2 the FDA requires when you develop a medical product. I
14:39:41 3 would expect to see those types of documents. But I don't
14:39:43 4 know where they are. Maybe they are on the missing server.
14:39:46 5 That's it. She doesn't attack, she doesn't specifically say
14:39:51 6 here are the documents that he's pointing to related to
14:39:54 7 experimental use and say those are insufficient or those
14:39:57 8 aren't the right type of documents or that's not what the
14:40:00 9 FDA requires.

14:40:01 10 THE COURT: Is that right, Ms. Frantzen, that
14:40:04 11 your expert didn't say I looked at the documents they have,
14:40:07 12 and those aren't sufficient to show experimental use?

14:40:11 13 MS. FRANTZEN: She actually -- she didn't
14:40:13 14 identify any documents to support their experimental use
14:40:17 15 defense, so her response was you didn't identify any
14:40:21 16 documents, we did have a 30(b)(6) witness --

14:40:23 17 THE COURT: Hold on. Stop. You just said we
14:40:26 18 have documents that we're relying on to show experimental
14:40:28 19 use. She said they never told us that. So where did you
14:40:32 20 tell them and what are the documents? No, seriously, you
14:40:36 21 should know the answer to that. Where are they? You just
14:40:39 22 told me they exist and they should know about them. Where
14:40:42 23 are they?

14:40:43 24 MR. BIDDINGER: They are on our exhibit list,
14:40:46 25 Your Honor. They cited to them themselves in their

14:40:48 1 interrogatories.

14:40:49 2 THE COURT: Did you ever identify them in
14:40:51 3 response to an interrogatory or anywhere telling them that
14:40:53 4 they're supposed to rely on them, that you're relying on
14:40:57 5 them?

14:40:57 6 MR. BIDDINGER: We certainly have an
14:40:58 7 interrogatory response that says that they conducted
14:41:02 8 experimental testing on these prototype devices.

14:41:05 9 THE COURT: Did you identify those documents?

14:41:08 10 MR. BIDDINGER: I would have to look back at the
14:41:09 11 interrogatory response, Your Honor. I'm sorry, I can't tell
14:41:12 12 you 100 percent that we did or did not.

14:41:15 13 THE COURT: Let's assume you didn't tell them
14:41:17 14 that you are going to rely on those documents, now you want
14:41:19 15 to come in and have someone say yeah, here are the
14:41:21 16 documents, we did our testing. What are they supposed to
14:41:24 17 do?

14:41:27 18 MR. BIDDINGER: I believe they're also cited in
14:41:29 19 our expert report to which she was supposedly relying.

14:41:32 20 THE COURT: You guys are pretty good at saying
14:41:32 21 they should have given it to us in discovery and we put it
14:41:32 22 in an expert report, we put it in an expert report. Nobody
14:41:32 23 seemed to put anything in discovery and now it's all in an
14:41:32 24 expert report. Okay. So I don't know what I'm supposed to
14:41:50 25 do with this.

14:41:51 1 MR. BIDDINGER: I guess -- I apologize, Your
14:41:53 2 Honor, that I can't point you to the exact place that we
14:41:56 3 cited those documents, but there is nothing in her report
14:41:59 4 where she's saying they have not come forward with evidence
14:42:04 5 of an experimental use, that is not what her expert report
14:42:08 6 says. It just is not it. All she's saying is he's raising
14:42:16 7 questions about a failure of proof on their part in the
14:42:18 8 opening invalidity expert report and she's saying PureWick
14:42:22 9 should have documented and recorded the types of details,
14:42:25 10 right, they would have documents regarding these that would
14:42:27 11 show exactly what models are tested, et cetera.

14:42:30 12 THE COURT: This is what I am going to do, given
14:42:31 13 that there is so much in the report that I think is
14:42:31 14 objectionable, I am going to grant the motion because I
14:42:31 15 think a lot of it is unreliable and calls for speculation.
14:42:41 16 That being said, if you can give me a proffer of what she
14:42:41 17 will say that is actually appropriate and not just guessing
14:42:50 18 at what should have been someplace and that she's responding
14:42:51 19 to something, I will reconsider that limited portion of her,
14:42:52 20 allowing that limited portion. But right now when I looked
14:43:02 21 through it, it seemed to be a lot of I'm guessing this
14:43:02 22 should exist and that doesn't seem appropriate for expert
14:43:12 23 testimony.

What's next from the defendant?

MS. FRANTZEN: Your Honor, it's our turn to go.

14:43:17 1 If we turn to slide 19, we have an issue on a new
14:43:22 2 infringement -- we have a new -- an issue on a new
14:43:31 3 infringement theory that was offered for the first time in
14:43:34 4 expert reports. And that is this issue, again, we're back
14:43:40 5 to the wicking material layer.

14:43:44 6 As we talked about with the testing, this is a
14:43:47 7 picture from PureWick's final infringement contentions on
14:43:52 8 slide 19. They identify this as their image that that
14:43:55 9 material right there is the wicking material, then all of a
14:43:59 10 sudden in expert reports they said that basically both items
14:44:03 11 are the wicking material.

14:44:04 12 THE COURT: All right. Do you have their final
14:44:06 13 contentions?

14:44:07 14 MS. FRANTZEN: Their final contentions, we say
14:44:11 15 Exhibit D, but it's Defendant's Exhibit 10.

14:44:13 16 THE COURT: Take a look, because I have in my
14:44:15 17 notes that there was disclosure of this at least in a
14:44:18 18 footnote in their contentions.

14:44:25 19 MS. FRANTZEN: That's where they cite two
14:44:28 20 documents in their final contentions. And I don't have
14:44:32 21 those in front of me, but what they refer to in those
14:44:35 22 footnotes is a document -- I mean, this is kind of clear as
14:44:39 23 day if you look at this Exhibit D, what are we identifying
14:44:43 24 as the wicking material, it's an arrow, this is what they do
14:44:46 25 in their expert report, they say these two layers are the

14:44:50 1 wicking material and part of this second layer is the
14:44:52 2 wicking material. That is completely new. The footnote
14:44:56 3 cites to documents, but all those documents do is refer to a
14:44:58 4 document that says hey, here is a picture of our device that
14:45:02 5 has multilayers. It never says that there is multiple, like
14:45:08 6 that one layer is the wicking layer and another layer is the
14:45:12 7 wicking layer.

14:45:12 8 THE COURT: All right. So the issue that I just
14:45:14 9 identified was the chambers limitation and to the extent you
14:45:20 10 have a motion on that, it's denied because I think what was
14:45:22 11 disclosed in the footnote is sufficient.

14:45:25 12 For the wicking material, this one I did have a
14:45:27 13 question for the plaintiff. You say the wicking material
14:45:32 14 limitation of claim 7 is pointing to both the spun bond
14:45:37 15 layer and the Jersey layer as reading on the microclimate
14:45:43 16 spun bond material. And then you have a red box that you
14:45:46 17 refer to in there. So looking at your contentions, and if
14:45:50 18 you pull them out, plaintiff, show me where you rely on only
14:45:55 19 a portion of the Jersey layer for the claimed wicking
14:46:00 20 material.

14:46:02 21 MS FELICE: Yes, Your Honor, there are two spots
14:46:04 22 where we're relying -- so this is our final infringement
14:46:12 23 contentions for the wicking limitation, claim 7, Your Honor.
14:46:15 24 And in both of these -- so let me put this one first. We
14:46:19 25 are pointing to both the Jersey fabric wicking material in

14:46:22 1 addition to the spun bond layer as fulfilling this wicking
14:46:27 2 material requirement as claimed.

14:46:34 3 THE COURT: Okay. Do you want to tell me what
14:46:36 4 you're talking about? Do you want me to just read the whole
14:46:40 5 paragraph?

14:46:41 6 MS. FELICE: No. I'm sorry, Your Honor. If we
14:46:43 7 look at the first line it talks about the PrimaFit utilizes
14:46:48 8 the wicking Jersey material. That's the material that
14:46:51 9 they're pointing to as saying this is the material that
14:46:54 10 underlies this spun bond material. So in this limitation,
14:46:59 11 we identified both this wicking Jersey material in addition
14:47:03 12 to the added spun bond layer for quicker drying and
14:47:08 13 diversion. We're saying both of these things combined
14:47:11 14 together to be the wicking material that this claim
14:47:14 15 requires.

14:47:15 16 THE COURT: I'm sorry, where does it say that
14:47:17 17 the added spun bond layer is part of the wicking?

14:47:21 18 MS FELICE: It starts here, Your Honor.

14:47:23 19 THE COURT: I see these words are there. I
14:47:26 20 don't see a word about wicking.

14:47:27 21 MS FELICE: We are talking about the quicker
14:47:30 22 drying and diversion, diversion specifically as being
14:47:33 23 wicking. If I may, Your Honor --

14:47:41 24 THE COURT: Did you just highlight that for me
14:47:44 25 here?

14:47:44 1 MS FELICE: No, that was highlighted in our
14:47:47 2 final contentions, Your Honor.

14:47:49 3 THE COURT: All right.

14:47:49 4 MS FELICE: And this follows, immediately
14:47:52 5 followed the next page, that was 43 and this is page 44
14:47:55 6 where we're pointing to both the wicking Jersey and the spun
14:47:59 7 bond layers to satisfy this claim limitation.

14:48:07 8 THE COURT: All right. Ms. Frantzen.

14:48:10 9 MS. FRANTZEN: Your Honor -- do you mind keeping
14:48:12 10 those, because I don't have a copy of that?

14:48:14 11 MS FELICE: Sure.

14:48:15 12 MS. FRANTZEN: Thank you.

14:48:16 13 So just to be clear here, this document shows
14:48:21 14 the wicking material and it's that layer, it's the spun bond
14:48:24 15 layer. The spun bond layer is what they're pointing out
14:48:28 16 with the arrow. This is just a quote from our document that
14:48:31 17 discusses both layers --

14:48:31 18 THE COURT: Go to the next thing where they
14:48:35 19 circle that thing in a red box.

14:48:32 20 MS. FRANTZEN: Yeah. So this is another picture
14:48:39 21 of this -- this shows the entire product. And if I may,
14:48:42 22 Your Honor, you know, when you're pointing at the product,
14:48:45 23 these layers are all combined together. Here is the
14:48:50 24 PrimaFit device that I have here. And so this is just a
14:48:54 25 picture pointing at this which has all the layers in it so

14:48:59 1 what they described and what they said repeatedly in that
14:49:04 2 blow up that we have on our slide 19, this is their picture
14:49:07 3 of what they said the wicking layer was and it was the spun
14:49:10 4 bond layer. And the reason why that is important is because
14:49:13 5 for the '407 patent you have to have these three layers.
14:49:16 6 You have to have wicking, porous and impermeable in that
14:49:21 7 order. That's how they identified it. I think this is just
14:49:23 8 after they realized during discovery that this wicking
14:49:27 9 material is not wicking at all, this is where we are trying
14:49:30 10 to recreate by saying oh, we pointed at this device and said
14:49:35 11 it's wicking. That is not what they said. And we built our
14:49:38 12 invalidity contentions around the concept that they had to
14:49:45 13 be discrete concrete layers, not that the second layer can
14:49:48 14 also be the first layer, that's a completely new concept.

14:49:59 15 THE COURT: All right. Hold on a second.

14:50:30 16 (Pause.)

14:51:42 17 All right. I am going to deny the motion.

14:51:45 18 What's next?

14:51:46 19 MR. BIDDINGER: Your Honor, I am going to talk
14:51:48 20 about I think it's DI 199 -- I hope I have it right this
14:51:52 21 time -- which is a motion to exclude opinions relating to
14:51:52 22 non-infringing alternatives. And during discovery we sought
14:52:02 23 contentions regarding non-infringing alternatives including
14:52:02 24 details such as when they were developed, persons most
14:52:10 25 knowledgeable, costs associated with them, et cetera. We

14:52:13 1 actually moved to compel a response to this which Your Honor
14:52:17 2 granted. And eventually we got a supplemental response and
14:52:22 3 there is a couple of different parts to it.

14:52:25 4 On the left-hand side this is just an excerpt,
14:52:28 5 but they went through for each patent and said
14:52:32 6 non-infringing alternatives including a urine collection
14:52:35 7 device without some claim limitation, so without a wicking
14:52:39 8 material, with the container is closed, et cetera, et
14:52:42 9 cetera, but there was no detail about what urine collection
14:52:45 10 device they were talking about, how it was constructed,
14:52:49 11 nothing about costs, anything like that. They mentioned a
14:52:54 12 bunch of other urine management products like diapers, et
14:52:58 13 cetera. And then they have this one sentence on the right
14:53:01 14 that's highlighted that says, "Moreover, Sage further
14:53:06 15 identifies at least the following documents relevant to this
14:53:08 16 interrogatory relating to PrimaFit 2.0 reflected above and
14:53:14 17 discussed during PureWick's depositions of Sage's witnesses.
14:53:17 18 That's all they said about PrimaFit 2.0. I don't know what
14:53:21 19 that means. I don't know what reflected above means.

14:53:20 THE COURT: All right. Get on from the
14:53:21 interrogatory response is crummy because, you know, I think
14:53:30 22 you guys have some crummy interrogatory responses as well.
14:53:34 23 What else do you have?

14:53:35 24 MR. BIDDINGER: Fair enough, Your Honor. When
14:53:37 25 we got to the expert reports, we got an extensive amount of

14:53:41 1 detail about what they were talking about.

14:53:42 2 THE COURT: Just like you did.

14:53:43 3 MR. BIDDINGER: They described a brand-new
14:53:45 4 alternative where they modified the accused product, they
14:53:49 5 never mentioned that ever before in fact discovery. They
14:53:53 6 also had a bunch of conversations with fact witnesses where
14:53:57 7 the fact witnesses told their expert about development
14:54:01 8 costs, something we specifically called for in the
14:54:04 9 interrogatory that they never gave us, about when it was
14:54:07 10 developed, how long it would take to develop it,
14:54:10 11 contractors, all sorts of new facts and details that we
14:54:14 12 specifically sought from them, expressly went after during
14:54:19 13 discovery and they didn't disclose to us. And we had no
14:54:21 14 opportunity to depose any of their fact witnesses about
14:54:25 15 because we didn't know any of these people had any knowledge
14:54:29 16 about that.

14:54:29 7 THE COURT: What about their argument that these
14:54:31 8 folks were disclosed in the Rule 26 as knowledgeable
14:54:35 9 concerning design options?

14:54:32 0 MR. BIDDINGER: I don't know how that alerts us
14:54:40 1 that they're knowledgeable about --

14:54:42 2 THE COURT: Did you take their depositions?

14:54:42 3 MR. BIDDINGER: We did take their depositions,
14:54:42 4 Your Honor, and we had no idea that they knew about the
14:54:42 5 costs to implement some alternative design of the accused

14:54:53 1 product that they never told us about before.

14:54:55 2 THE COURT: All right. Let me hear from the
14:54:57 3 defendants. Where do you disclose this? And let's assume
14:55:02 4 that just saying in a Rule 26 the design option isn't
14:55:05 5 enough, where was it disclosed?

14:55:08 6 MR. SURRETTE: It was disclosed in the
14:55:11 7 interrogatory, that's where it's disclosed.

14:55:14 8 THE COURT: Where was the information that
14:55:18 9 you're now arguing about Mr. Blabas and Mr. Alleri where
14:55:24 10 that was disclosed that folks should have known that they
14:55:27 11 were going to give all this specific information on
14:55:30 12 non-infringing alternative?

14:55:34 13 MR. SURRETTE: We identified a number of
14:55:36 14 non-infringing alternatives as relates to the PrimaFit and
14:55:39 15 PrimaFit product, here is an example right here, what else
14:55:43 16 would we be talking about other than the PrimaFit product?

14:55:46 17 THE COURT: Well, they asked for information
14:55:48 18 about what it would cost to do -- to make a non-infringing
14:55:52 19 alternative, et cetera, where did you disclose any of that?
14:55:55 20 They're saying now you got someone to tell your expert this
14:56:00 21 and we don't have any ability to cross-examine that person.

14:56:02 22 MR. SURRETTE: Well, Judge, they had an
14:56:04 23 interrogatory response, they had the Rule 26 disclosures
14:56:08 24 that Ms. Blabas, Mr. Ulrich and Mr. Sexton were designated
14:56:12 25 on PrimaFit design options, they didn't ask a single

14:56:19 1 question about it.

14:56:20 2 I guess I want to be perfectly clear, their
14:56:24 3 motion seems to exclude discussions of all non-infringing
14:56:27 4 alternatives and I think we want to make clear there is
14:56:31 5 three buckets of alternatives, there is alternatives of
14:56:35 6 product that existed before that we identified, we have
14:56:38 7 identified PrimaFit 2.0 as a non-infringing alternative and
14:56:43 8 we did these design options. They got the opportunity to
14:56:46 9 depose our witnesses, they put expert reports on this issue,
14:56:50 10 they got to depose our experts on this issue, there is no
14:56:54 11 prejudice.

14:56:54 12 THE COURT: What would you say about them
14:56:56 13 getting a deposition of those witnesses who talked to their
14:57:00 14 experts?

14:57:01 15 MR. SURRETTE: We would be agreeable to that.

14:57:02 16 THE COURT: I'm going to deny the motion. If
14:57:05 17 you want to have a deposition with those folks who had
14:57:07 18 off-the-record discussions with those folks, you can do it.

14:57:10 19 What's next for the defendant?

14:57:11 20 MR. SURRETTE: Judge, I would like to start with
14:57:12 21 Mr. Leonard's apportionment. It's going to be on slide 46.
14:57:22 22 So Leonard fails to apply a method to the apportionment
14:57:32 23 between the patented and unpatented features for the accused
14:57:35 24 products. Let me just explain how we believe what he did.
14:57:38 25 So he did a two-step process. And for the first step he

14:57:41 1 used something called the Shapley analysis to determine the
14:57:45 2 apportioned profit attributable to the patent-in-suit. Then
14:57:49 3 he takes that apportioned profit and discusses how the
14:57:53 4 parties would bargain over that using discount rates. The
14:58:00 5 issue is -- one of the issues is with this first step. His
14:58:08 6 first error is the Shapley Value Analysis, and then what he
14:58:12 7 did was he compared the profitability of two products that
14:58:16 8 were described in a Sage projection document. And the first
14:58:21 9 product is a premium product having the features of the
14:58:25 10 PrimaFit that aren't covered by the patent-in-suit such as
14:58:29 11 things like fit and securement. And then he compared the
14:58:34 12 profitability of that product to something called the Tier 2
14:58:37 13 product that was an unidentified hypothetical Tier 2 product
14:58:41 14 neither described or ever developed by Sage. And that's the
14:58:46 15 issue. The issue is with the Tier 2 product.

14:58:49 16 Leonard assumed that Tier 2 product is a proxy
14:58:52 17 important for the PrimaFit without the other features not
14:58:56 18 covered by the patent-in-suit, but he had no basis for that
14:58:59 19 assumption. The document describing the Tier 2 product is
14:59:02 20 up on the screen here and all it merely states is that it's
14:59:06 21 a simpler version and has reduced features.

14:59:09 22 In deposition, Dr. Leonard admitted that he
14:59:12 23 doesn't know what features might have been in the
14:59:15 24 hypothetical Tier 2 product. He conceded he had never seen
14:59:19 25 it, further admitted he doesn't know what specific features

14:59:22 1 it would have. In essence he treats the Tier 2 product as
14:59:26 2 only having the patented features and nothing else, but he
14:59:30 3 has no basis to say that. And this is the entirety of
14:59:34 4 Dr. Leonard's analysis.

14:59:35 5 THE COURT: Plaintiff.

14:59:36 6 MR. SURRETTE: I had --

14:59:38 7 THE COURT: Let me get a response to this.

14:59:41 8 Okay?

14:59:42 9 MR. SURRETTE: Sorry.

14:59:43 10 THE COURT: Plaintiff, tell me how Dr. Leonard
14:59:46 11 determined what Sage's Tier 2 product versus the PrimaFit
14:59:51 12 product is expected to have, how is it in his report, how
14:59:55 13 are we tying this all together?

14:59:57 14 MR. BIDDINGER: The apportionment analysis is in
14:59:59 15 paragraphs 75 to 88 in his report.

15:00:05 16 THE COURT: Why don't you show me rather than
15:00:07 17 tell me. You gave me two boxes of documents. I don't have
15:00:11 18 paragraphs 75 to 78, so if you want to say it's there, show
15:00:14 19 me.

15:00:14 20 MR. BIDDINGER: Okay, Your Honor, I can't pull
15:00:16 21 his report up right now. I'm sorry. We did our best to try
15:00:20 22 to figure out which motions we were going to have to deal
15:00:23 23 with here. This is what he cites to in his report, this
15:00:24 24 document.

15:00:25 25 THE COURT: Yes, but he just said he had no idea

15:00:30 1 what features these things had. How are we tying this
15:00:33 2 together?

15:00:34 3 MR. BIDDINGER: Well, actually this document
15:00:36 4 talks about the premium tier product has the features that
15:00:41 5 counsel just said are not part of the patented invention, so
15:00:46 6 it's securement and this inner spine. The document says
15:00:50 7 that. And then it says we have a Tier 2 one with reduced
15:00:54 8 features without the features that it just talked about in
15:00:56 9 the document. This is --

15:00:58 10 THE COURT: Does it have any features that are
15:01:00 11 not in the patent?

15:01:03 12 MR. BIDDINGER: No, we don't believe that it
15:01:05 13 does.

15:01:05 14 THE COURT: Does Dr. Leonard know that?

15:01:08 15 MR. BIDDINGER: What he said was it didn't have
15:01:10 16 the features of the premium product, right, or similar to
15:01:15 17 ours. He knows that document, he based his analysis on an
15:01:19 18 actual document in this case and that's a factual question
15:01:23 19 that they can cross-examine him on. But they don't
15:01:25 20 challenge his methodology. He did an apportionment. They
15:01:30 21 say he didn't do an apportionment, that's absolutely not
15:01:32 22 true. He absolutely tried to conduct an apportionment and
15:01:35 23 he did it based on the facts of this case. That's a
15:01:40 24 cross-examination question, not a reliability of his
15:01:42 25 methodology question.

15:01:46 1 THE COURT: All right.

15:01:46 2 MR. SURRETTE: May I respond to that, Your

15:01:48 3 Honor?

15:01:48 4 THE COURT: Yes.

15:01:49 5 MR. SURRETTE: So the fundamental problem is he

15:01:53 6 allegedly apportions and he's a comparing the profitability

15:01:57 7 of two products. He doesn't know what one of the products

15:01:59 8 is so how can that ever demonstrate a proper apportionment?

15:02:06 9 That's the error. And that's the very basis, that's the

15:02:09 10 starting point for the rest of his analysis. He has another

15:02:14 11 step where he talks about okay, now that there is this

15:02:18 12 profit that's attributable to the patent-in-suit, how would

15:02:21 13 the parties split it up? But the first step, that's

15:02:24 14 unreliable, because he doesn't know, he doesn't know what

15:02:28 15 features that product has. That product, it can have other

15:02:32 16 features, it could not be covered by the patent, it could be

15:02:35 17 prior art, he simply doesn't know and he testified to that.

15:02:48 18 THE COURT: So if I were to -- this is for the

15:02:51 19 royalty and you're saying if I grant this motion, they would

15:03:01 20 only have lost profits to rely on at trial?

15:03:05 21 MR. SURRETTE: I don't think he's properly

15:03:08 22 apportioned the royalty. Yes, they would only have lost

15:03:12 23 profits.

15:03:18 24 THE COURT: All right.

15:03:20 25 MR. BIDDINGER: Can I have one point?

15:03:21 1 THE COURT: Go ahead.

15:03:22 2 MR. BIDDINGER: This is their document, Your

15:03:24 3 Honor.

15:03:24 4 THE COURT: But the problem I have is who is

15:03:27 5 tying this together with the patent? We have a premium

15:03:31 6 product that has at least a couple of features. We have a

15:03:35 7 Tier 2 product that I guess doesn't have at least those

15:03:40 8 couple of features. But I don't know what it has.

15:03:44 9 MR. BIDDINGER: But the premium features, those

15:03:47 10 are -- we know exactly what those are. That's the accused

15:03:50 11 product, so we know exactly what those features are and

15:03:54 12 they're talked about by multiple people that they have this

15:03:58 13 added securement at the top.

15:04:00 14 THE COURT: Does Tier 2 have anything else

15:04:02 15 that's not covered by the patent? And if not, how do you

15:04:05 16 know?

15:04:06 17 MR. BIDDINGER: We go in based on the document

15:04:08 18 that they have that it doesn't have those features that we

15:04:11 19 have identified that are different from our patent.

15:04:12 20 THE COURT: I just want to understand. As far

15:04:15 21 as you're concerned, the patent covers every single feature

15:04:20 22 that would make someone want to buy a product other than

15:04:23 23 those couple of two things that are in the premium product.

15:04:25 24 MR. BIDDINGER: No, it covers everything about

15:04:30 25 the product, the PrimaFit product other than those added

15:04:35 1 **features --**

15:04:35 2 THE COURT: What are those other features and
15:04:36 3 are those features all fairly attributable to the patent or
15:04:40 4 not?

15:04:40 5 MR. BIDDINGER: The other features are the
15:04:41 6 **features of the PrimaFit product without the --**

15:04:46 7 THE COURT: I get it, but the question isn't the
15:04:48 8 patent -- I mean the question isn't the product, the
15:04:51 9 question is how are you tying this to the advantages of the
15:04:51 10 patent? All you're saying is well, we took out some of the
15:04:59 11 **features.** Okay. Did you take out all the features that
15:05:04 12 make it an appropriate apportionment? I don't know the
15:05:07 13 answer to that, and I don't understand what you're telling
15:05:11 14 them.

15:05:12 15 MR. BIDDINGER: We have our experts, technical
15:05:14 16 experts talking about the fact that the product is
15:05:16 17 completely encompassed by the patent, right, the patent
15:05:20 18 claims cover all the core functionality of the product
15:05:24 19 except for that adhesive for the flex fit spline which are
15:05:31 20 those patented features that we are talking about in this
15:05:35 21 document.

15:05:35 22 THE COURT: Does Dr. Leonard say he's relying on
15:05:38 23 that?

15:05:38 24 MR. BIDDINGER: Yes, absolutely. Sorry, it says
15:05:45 25 I understand the asserted patent covers technology that

15:05:49 1 enabled the fundamental features of the PrimaFit product,
15:05:52 2 however the PrimaFit products have additional features not
15:05:55 3 covered by the asserted patent related to fit and
15:05:59 4 securement. Question, and the adhesive pad. And he cites
15:06:02 5 to conversations with Dr. Collins, the technical expert.
15:06:08 6 This is paragraph 78 of his expert report.

15:06:11 7 THE COURT: All right. Any response?

15:06:13 8 MR. SURRETTE: My response, Your Honor, is he's
15:06:15 9 talking about the premium product. The first step of the
15:06:19 10 process compares the profitability of the premium product to
15:06:21 11 the Tier 2 product and no one knows what the Tier 2 product
15:06:25 12 is. They didn't ask a single witness about it during
15:06:30 13 deposition, not a single fact witness did they ask anybody
15:06:32 14 about the Tier 2 product.

15:06:34 15 Dr. Lennon admitted that he doesn't know what
15:06:39 16 features are in the Tier 2 product. All this document says
15:06:41 17 is it has reduced features, but that it's similar, but that
15:06:45 18 doesn't mean -- there is no testimony, there is no evidence
15:06:48 19 as to what's in that product, but he's saying that it has
15:06:52 20 all the features in the patent, that's the fundamental
15:06:56 21 error.

15:06:58 22 THE COURT: So they're saying by logic if you
15:07:02 23 take the premium product which is the accused product and
15:07:05 24 you take out the couple of features that are mentioned as
15:07:10 25 premium features, then what's left is Tier 2, and that's

15:07:15 1 what they're asserting is an apportion of the product.

15:07:20 2 MR. SURRETTE: With all due respect, Your Honor,

15:07:22 3 that's just guess work. They don't know that. That

15:07:27 4 document doesn't say that. They took no deposition

15:07:30 5 testimony. They could have asked Ms. Blabas, Ms. Sexton

15:07:34 6 about, they never did. That's the fundamental error.

15:07:47 7 THE COURT: I get it, you're saying that's

15:07:49 8 logic, but is it true you never asked anyone what's the Tier

15:07:52 9 2 product?

15:07:53 10 MR. BIDDINGER: We actually did ask

15:07:55 11 Mr. Alexander, one of the witnesses about this, and he said

15:07:59 12 he doesn't know anything about the document. But I think

15:08:02 13 it's a cross-examination question. It's their document, I

15:08:05 14 mean, for him to say we don't know --

15:08:07 15 THE COURT: My problem is your expert had to

15:08:10 16 apportion, and he's apportioned based on a product that

15:08:15 17 nobody knows what it is. That seems wrong.

15:08:21 18 MR. BIDDINGER: I mean, I guess I disagree with

15:08:24 19 the interpretation of the document. I think that what we

15:08:27 20 know what it is --

15:08:28 21 THE COURT: Let me see the document again.

15:08:32 22 So I'm sorry, how do we know what the reduced

15:08:42 23 features are?

15:08:42 24 MR. BIDDINGER: So the document above this talks

15:08:44 25 about it being -- so it's describing, you can see in the

15:08:48 1 kind of grayed out thing on the left, product Sague, that's
15:08:52 2 the product that led to the accused product. That's the
15:08:55 3 picture that led to the accused product and it talks about
15:08:57 4 how it had a feature rich solution and highlighting the
15:09:02 5 features, like we talked about, the flexion and absorbant
15:09:05 6 pad, and the design basically without those features.

15:09:11 7 MR. SURRETTE: That's not what that says. It
15:09:13 8 could have a cheaper version of the Flexfit Core, it could
15:09:17 9 have a number of things that are reduced features, we just
15:09:21 10 don't know what they are and no one asked about it. And
15:09:24 11 Mr. Alexander is a corporate designee, he's our in-house
15:09:30 12 counsel. They didn't ask a single technical -- and I stand
15:09:34 13 corrected that they asked him about this.

15:09:36 14 THE COURT: I'm going to grant the motion
15:09:38 15 because I don't see that there is any tie between the
15:09:43 16 unknown Tier 2 products and the features of the patent. I
15:09:46 17 get it that it eliminates perhaps or gives cheaper versions
15:09:50 18 of some of the features, but it doesn't seem that we have
15:09:53 19 any idea what Tier 2 is.

15:09:55 20 What's next for the defendants, or plaintiffs?

15:10:02 21 MR. CHERNY: I went first.

15:10:02 22 THE COURT: Plaintiff, what's next?

15:10:12 23 MR. CHERNY: I guess, Your Honor, we only had
15:10:20 24 four Dauberts. I think we have argued everything that we
15:10:24 25 had intended to argue.

15:10:26 1 THE COURT: Okay. Excellent.

15:10:32 2 You're just about out of time, so what's the

15:10:35 3 most important one for me to deal with here?

15:10:39 4 MS. FRANTZEN: Just a quick one, Your Honor, on

15:10:41 5 the state of mind interrogatory -- the state of mind motion

15:10:55 6 -- 24. Just we provided a motion that Mr. Jezzi and

15:11:04 7 Mr. Collins provide all this testimony. Can you go to the

15:11:09 8 next slide.

15:11:12 9 Here is the example, Dr. Collins just opining

15:11:16 10 that we're willful and malicious and we're a pirate and that

15:11:20 11 we willfully infringed and that we acted in bad faith. We

15:11:25 12 provided specific paragraphs in our proposed order and

15:11:28 13 Mr. Jezzi makes similar statements where he's just saying

15:11:32 14 you're bad --

15:11:35 15 THE COURT: Copying is different than saying

15:11:35 16 willful like a pirate. You can have evidence of copying

15:11:40 17 that he could opine on, he could say they had this, they

15:11:43 18 looked at it, they wrote in their document I am going to use

15:11:47 19 this as my model and copy it, copying, I don't get.

15:11:52 20 MS. FRANTZEN: Can I just make one point on

15:11:52 21 copying. Mr. Jezzi is not an expert on whether something is

15:11:52 22 a copy or not. If he wanted to say something like this is

15:12:03 23 not, you know, in engineering we don't do the following

15:12:06 24 things. But for him to say something is a copy of another

15:12:10 25 thing, that invades the province of the jury in our view and

15:12:15 1 we did cite some case law that says we can't say that.

15:12:18 2 Our expert, for example, provided an opinion
15:12:21 3 that like normal engineering behavior you can do this or
15:12:25 4 that. This isn't something like what a standard engineer
15:12:29 5 would do, it's just looking at something and saying it's a
15:12:32 6 copy. That's invading what the fact finder is supposed to
15:12:36 7 find or determine. So if it was linked to some type of
15:12:42 8 engineering knowledge, that would be fine, but other than
15:12:44 9 just looking at something and saying that it was a copy,
15:12:50 10 that involves no expertise and he's not a copying expert,
15:12:55 11 he's just an engineer.

15:12:56 12 THE COURT: What is the evidence -- nobody is
15:12:59 13 getting up here and saying it was wanton and willful like a
15:13:04 14 pirate. Right? First of all, that's not going before a
15:13:07 15 jury anyway because that's for me. That goes to enhancement
15:13:11 16 if there was willfulness. You agree, your experts are not
15:13:14 17 going to get up there and say that?

15:13:16 18 MR. BIDDINGER: Yes, Your Honor.

15:13:17 19 THE COURT: Now, what is the evidence of copying
15:13:20 20 that he's going to -- that any expert is going to rely on?

15:13:21 21 MR. BIDDINGER: So they look at -- these are our
15:13:22 22 technical experts. Just so I don't have to bend over, I'm
15:13:35 23 sorry, Your Honor. They look at the documents relating to
15:13:38 24 the development of the product and the prototypes that they
15:13:40 25 made, the evolution of those prototypes and how they

15:13:44 1 converged on a solution that was identical to our product.
15:13:48 2 And the fact that they were actually testing our product in
15:13:50 3 doing that. There are lab notebooks that record those tests
15:13:54 4 that they cite to, and they have -- our expert has mapped
15:13:58 5 our product to the claims, and mapped their product to the
15:14:02 6 claims, and opined on the similarity of those products and
15:14:07 7 the fact that it is functionally and structurally the same
15:14:11 8 as our product. It is evidence that it is a copy of our
15:14:14 9 product based on their own documentation.

15:14:21 10 THE COURT: So can he do what they just said up
15:14:26 11 to the point where he says Sague copied, can he go through
15:14:32 12 and say look, this is what they did to develop it. They had
15:14:35 13 our product. They went through these things and they
15:14:38 14 ultimately landed on a product that's very similar to our
15:14:41 15 product. What's wrong with that?

15:14:43 16 MS. FRANTZEN: Yeah, so, I think those facts are
15:14:46 17 okay if he wants to compare the technological similarities.
15:14:50 18 I will say one thing that someone pointed out which I think
15:14:53 19 is a good point, is that now that the '508 patent is out of
15:14:57 20 the case, the other patents that they are going to claim
15:15:02 21 were copied didn't even exist at the time, so it makes it
15:15:04 22 even more irrelevant that those products are not covered by
15:15:10 23 the patent and would not be, you know, part of that. And I
15:15:12 24 guess that might be an issue for another day --

15:15:18 25 THE COURT: No, I think that there is case law

15:15:20 1 out there that pre-issuance copying may be relevant to
15:15:24 2 defendant's state of mind post issuance. So that's not
15:15:28 3 going to get it out. But whether I am going to let him say
15:15:33 4 copied or not we can decide at trial. If you really want
15:15:37 5 him to say my opinion is they copied, don't say it until we
15:15:42 6 talk about it some more and I can hear it in context. But
15:15:46 7 everything else that he's allowed to get up there and say
15:15:56 8 they had the PureWick product, they looked at it, they
15:16:01 9 developed something that had many of the same features of
15:16:06 10 that product, that's all fine, and we're not going to say
15:16:09 11 the characteristic stuff about pirate. Just so you know in
15:16:14 12 my view all you have to do is show knowledge of the patent
15:16:17 13 and deliberate infringement, so all of this stuff about
15:16:21 14 wrongful, flagrant, bad faith, deliberate, egregious,
15:16:23 15 malicious, wanton, wilful, that comes in if the jury finds
15:16:30 16 willfulness. You don't use those words in front of a jury.
15:16:34 17 Okay. What's next? You got one more.
15:16:37 18 MS. FRANTZEN: We do not have anymore. Thank
15:16:40 19 you, Your Honor.
15:16:42 20 THE COURT: So we dealt with plaintiffs. I know
15:16:58 21 that we had -- defendant had as part of DI 197 no
15:17:02 22 infringement of the '407, that is denied.
15:17:02 23 No infringement of the '989 and '376. That's
15:17:15 24 denied.
15:17:15 25 No infringement of the '989. That's denied.

15:17:19 1 **Invalidity based on prior sales.** That's denied.

15:17:23 2 **Invalidity regarding claim 7 as indefinite, lack**

15:17:27 3 **of written description.** That's denied.

15:17:29 4 **No willfulness.** That's denied.

15:17:33 5 **Damages,** I think that was on the '507. That's

15:17:40 6 **mooted.**

15:17:42 7 **The lost profits summary judgment on the lost**

15:17:45 8 **profits claim.** Denied.

15:17:50 9 **Then we have the teaching away issue.** That was

15:17:51 10 **one where I think I mentioned at the last hearing, there**

15:18:03 11 **might be something in one of those, all you did was give me**

15:18:06 12 **a string cite basically saying go figure out for yourself if**

15:18:11 13 **there is teaching away appropriately in there.** So that's

15:18:15 14 **denied, but I guess to the extent you want to object at**

15:18:18 15 **trial, you can.**

15:18:19 16 **The testing one I think we already denied.**

15:18:21 17 **Irrelevant materials.** Denied.

15:18:24 18 **The errata.** Denied.

15:18:32 19 **The Collins non-infringing alternatives.**

15:18:32 20 **Denied.**

15:18:32 21 **The PrimaFit 2.0.** Denied.

15:18:42 22 **The new infringement regarding the chamber.**

15:18:51 23 **Denied.**

15:18:51 24 **The wicking material, whatever I had on that**

15:18:55 25 **one, I don't even remember.** The new theories about the '989

15:18:58 1 patent. Denied.

15:18:59 2 Willfulness. Denied.

15:19:06 3 Yun has offered to provide an opinion from the
15:19:09 4 prospective of a clinician. I don't even remember what that
15:19:13 5 one is, but I have cross-examine him if you have a problem
15:19:16 6 with him.

15:19:17 7 Leonard apportionment we already decided. And
15:19:23 8 the other ones on Dr. Leonard are denied.

15:19:26 9 So to the extent I haven't responded to a
15:19:31 10 specific one, it's denied. But I think from the defendants
15:19:34 11 I had twenty-nine separate grounds for motions. So, you
15:19:41 12 know, by doing that in the page limits, you not only gave me
15:19:48 13 terrible arguments, but you messed up their arguments
15:19:51 14 because they had to try and respond to so much, so that's
15:19:54 15 another grounds to the extent I haven't said something in
15:19:57 16 particular on given grounds, that's another reason that the
15:20:01 17 motions are denied.

15:20:02 18 So with that, I think I have dealt with those.
15:20:07 19 Anything else we need to deal with?

15:20:12 20 MR. CHERNY: Not from the plaintiffs, Your
15:20:16 21 Honor.

15:20:122 THE COURT: Defendants?

15:20:20 23 MR. SURRETTE: Nothing else, Your Honor.

15:20:21 24 THE COURT: All right. I will say this, that
15:20:23 25 you guys need to get together and discuss whether there is

15:20:26 1 any potential to settle these matters. I know that
15:20:30 2 sometimes that's difficult, but I am going to order you to
15:20:34 3 do it and have decision makers involved in those discussions
15:20:38 4 and report back to me on who was involved, how long they
15:20:42 5 occurred, things like that.

15:20:43 6 MR. CHERNY: Your Honor, may I address that for
15:20:45 7 a second?

15:20:46 8 THE COURT: Yes.

15:20:47 9 MR. CHERNY: If it wasn't clear, we've actually
15:20:49 10 had conversations with the decision makers or at least
15:20:53 11 representatives of each party. And then after that, Sage
15:20:58 12 contacted Magistrate Judge Thynge. We talked to her and it
15:21:01 13 was her conclusion that she didn't think a mediation at this
15:21:05 14 point would be fruitful.

15:21:06 15 We're happy to continue talking because
15:21:08 16 obviously the Court would like that, but it wasn't clear to
15:21:11 17 me that the Court was aware that we actually have had
15:21:14 18 discussions.

15:21:15 19 THE COURT: I know. But we now have decisions
15:21:17 20 on these things. We are going to trial. You guys have
15:21:21 21 multiple trials. We are bringing in a jury during the
15:21:22 22 pandemic. And I think the least the parties can do is
15:21:23 23 engage in some good faith discussions.

15:21:24 24 MR. CHERNY: Your Honor, we are happy to do
15:21:25 25 that. I want to make sure the Court was aware that there

15:21:32 1 **was some --**

15:21:32 2 THE COURT: Yeah, I know, Judge Thyng told me.

15:21:35 3 MR. CHERNY: Okay.

15:21:36 4 THE COURT: Anything else?

15:21:37 5 MR. SURRETTE: No, Your Honor.

15:21:38 6 THE COURT: So I am going to order that that be
15:21:42 7 done by some point by the time before the pretrial order is
15:21:47 8 submitted and then you're going to have to send me a letter
15:21:50 9 with who was involved, how long the discussions lasted, how
15:21:53 10 were they, were they in person, were they on the phone, how
15:21:57 11 did they go. All right?

15:22:00 12 MR. CHERNY: May I raise one additional issue,
15:22:02 13 Your Honor?

15:22:04 14 THE COURT: Of course.

15:22:05 15 MR. CHERNY: We have proposed per our last
15:22:06 16 hearing a narrowing, and you told us sixteen claims.

15:22:10 17 THE COURT: Sixteen was too many.

15:22:11 18 MR. CHERNY: Sixteen was too many.

15:22:12 19 THE COURT: You lost a few with the '508 patent.

15:22:14 20 MR. CHERNY: Yes. And so we have made a
15:22:16 21 proposal, we assume that having heard your decision today
15:22:18 22 that Sage will be prepared to respond to it, but it seems
15:22:20 23 like it would be good to have a date by which we can inform
15:22:22 24 you that we've managed to narrow things for you.

15:22:32 25 THE COURT: I saw that proposal, it was attached

15:22:34 1 to something. Was it twelve or ten?

15:22:36 2 MR. CHERNY: We have proposed going from sixteen
15:22:39 3 to ten. I don't know whether the Court has a reaction
15:22:41 4 whether ten is a good number.

15:22:43 5 THE COURT: I guess it depends if they're
15:22:44 6 overlapping. If you think you can -- it's a lot for a jury,
15:22:50 7 but it's getting into the range of reason, yes.

15:22:53 8 MS. FRANTZEN: I would just say we didn't agree
15:22:56 9 to talk about it because -- well, eliminating the '508
15:23:00 10 patent eliminates some of those claims. And the main issue
15:23:03 11 for us was what dependent claims were being asserted because
15:23:07 12 that implicated the prior art. We're at a point that it
15:23:10 13 would be helpful to just know, please just tell us what
15:23:14 14 claims you're asserting against us so we can --

15:23:17 15 THE COURT: Yes, but you understand if they do
15:23:19 16 that they're giving up their leverage in you telling them --
15:23:21 17 you guys need to start to eliminate -- limit your prior art
15:23:24 18 defenses. Do they know what you're asserting in terms of
15:23:31 19 prior art?

15:23:32 20 MS. FRANTZEN: Yes, Your Honor. And our prior
15:23:34 21 art, the patents -- for example, with the '376 and '989, we
15:23:36 22 have basically the PureWick prior art and the two other
15:23:40 23 references, so the other subsidiary --

15:23:43 24 THE COURT: Wait. I don't want to hear ever
15:23:46 25 again the PureWick prior art. It needs to be a product.

15:23:53 1 Okay?

15:23:55 2 MS. FRANTZEN: Brown tape product.

15:23:56 3 THE COURT: Wait. Do we know what brown tape
15:23:58 4 product because apparently there is multiple?

15:24:02 5 MS. FRANTZEN: The brown tape product that was
15:24:04 6 demonstrated and sold, for example, at CONNECT and used by
15:24:11 7 -- but my point to that is, for example, when they narrowed
15:24:14 8 the claims, I don't mean to get into a subsidiary dispute,
15:24:18 9 but, for example, they picked claim 6 which depended on
15:24:21 10 claim 5 which depended on claim 1, so that was one claim but
15:24:25 11 it's really three claims. So we have to invalidate all the
15:24:29 12 other claims in that one supposed claim. And that's why we
15:24:32 13 just like to -- we're not asserting a lot of references.
15:24:36 14 We're at a point where it's so narrow, and the extra ones
15:24:40 15 are just for dependent claims.

15:24:42 16 So we just would like to know what they're
15:24:44 17 asserting, and then I think we would propose something
15:24:48 18 reasonable because it's not like we have twenty references.

15:24:51 19 THE COURT: What's your proposal that got you
15:24:53 20 down to ten, what claims are they?

15:24:56 21 MR. CHERNY: Do we have those specific claims?
15:24:58 22 We made a proposal to exchange, without --

15:25:01 23 THE COURT: Exchanging really kind of -- I know
15:25:04 24 it's probably not you, but if there is no exchanging, no one
15:25:08 25 knows what's going on here.

15:25:09 1 MR. CHERNY: Your Honor, may I be frank? I
15:25:11 2 raised this, we made --

15:25:12 3 THE COURT: You may be Frank, Steve.

15:25:16 4 MR. CHERNY: May I be Steven again?

15:25:17 5 Your Honor, we made a proposal and said here is
15:25:20 6 how we should do this, the '508 is now out, that changes
15:25:24 7 things a little bit. When I stood up all I wanted was a
15:25:28 8 date which we could provide you with it. I don't want to
15:25:32 9 argue with the other side about whether dependent claims are
15:25:34 10 necessary because some may be necessary depending on the
15:25:37 11 art, I really much rather not argue with the other side
15:25:40 12 about what the narrowing is. Let's get together and pick a
15:25:43 13 date by which we can say to you here are the claims we
15:25:48 14 propose and here is the prior art.

15:25:49 15 THE COURT: I think what we're saying is are you
15:25:51 16 suggesting that you won't do those things on the same day or
15:25:55 17 what --

15:25:56 18 MR. CHERNY: No.

15:25:57 19 THE COURT: What Ms. Frantzen is suggesting is
15:26:00 20 give you her claim numbers and they'll tell you their prior
15:26:02 21 art. If you think she needs to limit her prior art, you can
15:26:08 22 tell her. If she thinks you need to limit your claims
15:26:12 23 further, she can tell you.

15:26:12 24 MR. CHERNY: Your Honor, that was exactly the
15:26:13 25 proposal, we would give them our claims and they would

15:26:17 1 respond. I want a date to which we can inform you.

15:26:20 2 THE COURT: I am shutting down my computer which
15:26:23 3 is having some slowness issues.

15:26:25 4 What date? I don't have a calendar in front of
15:26:28 5 me.

15:26:29 6 MR. CHERNY: We can give them claims by what
15:26:32 7 date, five days, four days, Monday.

15:26:34 8 THE COURT: Monday. When do you want to respond
15:26:37 9 to them?

15:26:38 10 MS. FRANTZEN: Four or five days after that.
15:26:40 11 We'll try to do it faster because we're trying to prepare.

15:26:42 12 THE COURT: Once you get theirs, try and get it
15:26:46 13 to me by a week.

15:26:48 14 MR. CHERNY: This one was the one part where I
15:26:50 15 think cooperation was not going to be hard, I just want to
15:26:54 16 get a date so we can move on to a trial.

15:26:56 17 MS. FRANTZEN: Absolutely.

15:26:57 18 THE COURT: All right.

15:27:00 19 COURT CLERK: All rise.

20 (Court adjourned at 3:27 p.m.)

21

22 I hereby certify the foregoing is a true and
23 accurate transcript from my stenographic notes in the proceeding.

24

/s/ Dale C. Hawkins
Official Court Reporter
U.S. District Court

25